UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SULLIVAN & COZART, INC.

Employer

and Case 9-RC-18048

KENTUCKY LABORERS' DISTRICT COUNCIL
ON BEHALF OF LABORERS, LOCAL 576

Petitioner

DECISION AND ORDER

I. INTRODUCTION

The Employer is engaged in the general construction business, operating out of offices located in Louisville, Kentucky. Until recently, the Employer and the Petitioner were parties to a series of collective-bargaining agreements covering employees working for the Employer in the classification of laborer. These agreements were entered into under Section 8(f) of the National Labor Relations Act (Act), which allows employers in the construction industry to enter into collective-bargaining agreements without any showing that the contracting union represents a majority of the employees in the applicable unit. The Petitioner now seeks an election to achieve bargaining representative status under Section 9(a) of the Act. The Petitioner argues that a unit coextensive with Local 576's jurisdictional boundaries – which exceed the geographic area of the unit set forth in the expired Section 8(f) agreements – is appropriate and declines to proceed to an election in any other unit. The Employer contends that the only appropriate unit, in which an election may be conducted consists of all of its employees working as laborers, with no geographic limitations.

I have carefully considered the evidence and the arguments presented by the parties on this issue, including those contained in their briefs, and conclude that the unit sought by the Petitioner is inappropriate because it does not comport with any historical, operational, administrative or other functional grouping of employees; excludes employees with identical terms and conditions of employment to those of employees that it includes; and seeks to incorporate territory in which the Employer has never conducted business and there is no showing that it will do so in the future.

To provide a framework for my discussion of the issue, I will first set forth the factual background relevant to this matter. I will then set forth the applicable legal precedent and articulate the reasoning that supports my determination.

II. BACKGROUND

The Employer is in the construction business acting as a general contractor and construction manager. Its offices are located in a single facility in Louisville, Kentucky. Working out of these offices are the Employer's officers (President Dan Sullivan, Vice-President Mike Thorpe, Secretary/Treasurer Robert Lawrence), two project managers (in addition to Thorpe who also works as a project manager) and three clerical employees.

The project managers are responsible for placing bids for work or otherwise negotiating for new projects. The project managers are assigned form one to four ongoing projects. A project manager handles all of the correspondence and other communications between the owner, architect and engineers, as well as performs such work as checking all the shop drawings, relevant to any project to which he has been assigned. Except for approximately once a week visits to the job sites, they work out of the Louisville offices. On the job-sites themselves, the Employer utilizes job superintendents, laborers, carpenters and operating engineers.

There is a core of employees that the Employer, at the discretion of the job superintendents, may move from one job to another; these include approximately 10 laborers. During the last 5 years the Employer has utilized up to 30 or 40 laborers at one time. It ordinarily procures laborers through a hiring hall operated by Laborers Local 576; but apparently, as discussed below, may have also on occasion procured them from a hiring hall operated by Laborers Local 189.

The Employer and the Petitioner have been parties to a series of Section 8(f) agreements stretching back over 30 years – the last agreement being effective by its terms from July 1, 2002 until June 30, 2005. Louisville is located in Jefferson County and it is estimated that 97 percent of the Employer's construction business has been performed in this county during the past 5 years. The remaining 3 percent of its work during this time period were jobs located in the Kentucky counties of Fayette, Oldham and Carroll. [1]/ Jefferson and Oldham are two of the 24 counties specified as being covered by the expired Section 8(f) agreement – Carroll and Fayette are not. In

[1]/ The Petitioner states in its brief that in the last 5 years the Employer has also performed work in Shelby County. The record is, however, inconclusive as to the Employer ever performing work in Shelby County. There is merely some discussion about whether the Employer might have done one small project at some indeterminate point in time in that county. I note, in this regard, that the Petitioner entered numerous records of referrals into the record, but none reflected referrals from Local 576's hall to a Petitioner project in Shelby County.

addition to the 24 counties set forth in the expired agreement, the jurisdiction of Local 576 covers another 10 counties (one of these being Carroll). It has apparently had jurisdiction over all these 34 counties during the lives of at least several of the previous Section 8(f) agreements -- all of which covered only 24 counties. [2]/ Fayette County is within the geographic jurisdiction of Laborers Local 189. However, when the Employer has performed work there, it has applied the terms of its contract with Local 576. At the time of the hearing in this matter, the Employer had either just completed, or still had ongoing, a project in Fayette County. It had also performed work on a project in that county which had begun in December 2004 and ended in late 2005. The Employer indicated that the "bulk" of the laborers on this project were its employees transferred to the project. [3]/

The Employer was signator to a contract with "The Kentucky Laborers District Council for and on behalf of Laborers Local Union No. 576 and Laborers' Local Union No. 189" which appears to have covered the geographic jurisdiction of both locals. That contract was effective by its terms from July 1, 1988 until June 30, 1993. While the contract contained a roll-over provision if neither party gave the notice required under the agreement, it appears that it has not been given effect beyond its expiration date. On April 30, 2001, the Employer also entered into a project agreement with "The Kentucky Laborers District Council for and on behalf of Laborers Local Union No. 576 and Laborers' Local Union No. 189" covering a single project at one particular employer in Carroll County. At no time has the Employer ever entered into a contract with the Petitioner acting on behalf of only Local 576, which covered any counties other the 24 mentioned previously. It appears that when work was performed in Carroll County under one or the other of the two multi-local agreements, the Employer, at least on occasion, procured laborers from Local 189 to supplement the Local 576 laborers that it brought with it. The Employer is currently performing work in Carroll County evidently applying the terms of the expired Section 8(f) agreement with Local 576 despite the fact that on its face the agreement does not cover that county, and that it procures any additionally needed laborers from the Local 576 hall.

There is a rather confusing bargaining history between the Petitioner and other employers and employer associations regarding geographic coverage of collective-bargaining agreements. Thus, a "Building Construction Agreement" between "Laborers' International Union of North America, Kentucky Laborers' District Council acting on behalf of Local Union No. 576" and various employers was effective by its terms from July 1, 2002 to June 30, 2005. This contract is nearly identical to the expired Section

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[2]/ The precise time period that Local 576 has had jurisdiction over the counties in issue is unclear from the record, but it is clear that it has spanned over the life of multiple collective-bargaining agreements.

[3]/ The Petitioner attempted to argue in its brief that record evidence appeared to show that only a third of the laborers were transfers to this project. However, the Petitioner itself demonstrated that the records it relies upon for this assertion were inaccurate and that testimonial evidence was more accurate.

8(f) agreement to which the Employer was a party – including that it covered only a portion of Local 576's territory. There is another contract between a multi-contractor bargaining association -- "Construction Employers Association of Central Kentucky, Inc." -- and "The Kentucky Laborers District Council for and on behalf of Laborers Local Union No. 576 and Laborers' Local Union No. 189," which covers the counties of Local 576 not covered in the previously described agreement. This latter contract (referred to as the CEA contract) is effective by its terms from June 1, 2003 to May 31, 2006. There is now, however, a new Building Construction Agreement, effective by its terms from July 1, 2005 to June 30, 2008, that expands the coverage of the previous Building Construction Agreement to one coextensive with that of the jurisdictional boundaries of Local 576. It seems that when the additional counties were inserted in the new Building Construction Agreement, they were "removed" from the CEA agreement – despite the fact that they still appear in CEA contract with no reference to their "removal." In any event, it appears clear that until recently there has been no agreement between solely Local 576 and any employer which covered the entire 34 counties which the Petitioner seeks to include in the unit for an election.

III. LEGAL PRECIDENT

Section 9(b) of the Act states the Board "shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . ." The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act only requires that the unit be "appropriate." *Overnite Transportation Co*., 322 NLRB 723 (1996); *Parsons Investment Co*., 152 NLRB 192, fn. 1 (1965); *Morand Bros. Beverage Co*., 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); *Purity Food Stores, Inc*., 160 NLRB 651 (1966). Thus, there is ordinarily more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-3 (4th Cir. 1962), cert. denied 375 U.S. 966 (1964); *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962). However, it is also clear that the unit sought to be represented may not be an arbitrary grouping of employees. *Stormont-Vail Healthcare*, 340 NLRB 1205, 1207 (2003); *Basha's Inc*., 337 NLRB 710, 711 (2002); *Seaboard Marine*, 327 NLRB 556 (1999); *Brand Precision Services,* 313 NLRB 657, 658 (1994). Although it has been held that extent of organization may be taken into consideration as one of many factors considered in unit determinations, under Section 9(c)(5) of the Act extent of organization may not be a controlling factor in evaluating the appropriateness of a requested unit. Thus, a unit based solely or essentially on extent of organization is inappropriate. *New England Power Co*., 120 NLRB 666 (1959); *John Sundwall & Co*., 149 NLRB 1022 (1964).

A unit of all the employees of an employer is presumptively appropriate under the Act. *Mid Allegheny Corporation*, 233 NLRB 1463 (1977); *Pine Transportation, Inc*., 197 NLRB 256, fn. 8 (1972). Also the bargaining history of the parties, even an Section 8(f) history as found here, may under certain circumstances support a finding that the unit sought is appropriate. *P.J. Dick Contracting, Inc*., 290 NLRB 150, 151 (1988).

IV. ANALYSIS AND DETERMINATION

Rather than seek a unit grounded on some recognized appropriate criteria, the Petitioner seeks a unit that does not comport with any historical, operational or administrative grouping of the Employer's employees. [4]/ The Petitioner also attempts to include counties in which the Employer has not conducted business and there is no evidence that it has any immediate plans to do so. [5]/

It appears clear that the only basis on which the Petitioner has developed the geographic parameters of the unit it seeks to represent is one based on the geographic jurisdiction of the Petitioner. However, it is the functional groupings and common interest of employees (often as a consequence of how an employer has operated its business), not how a petitioner may have structured itself, that is relevant to a determination that a unit sought is appropriate. [6]/ For example, in *P. J. Dick Contracting Inc*., supra, the union petitioner sought an election in a unit described as including all 33 counties within its geographic jurisdiction. There was not, however, any other evidence adduced as to why this would constitute an appropriate unit. The Board, therefore, found it to be inappropriate for bargaining. Thus, it appears that *P.J. Dick* is controlling in this matter and I do not view the 34-county unit sought by the Petitioner as appropriate.

In *P.J. Dick*, the Board found that the 11 counties set forth in a Section 8(f) collective-bargaining agreement between a multiemployer bargaining association of

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[4]/ For cases in which the requested units were found to be inappropriate because they did not conform to some historical, operational, administrative or other functional grouping of employees. See, *Laboratory Corporation of America Holdings*, 341 NLRB No. 140, slip op 4 (2004); *Basha's Inc*., 337 NLRB at 441; *American Can Company*, 109 NLRB 1284, 1288-89 (1954).

[5]/ For a construction industry case in which the petitioner unsuccessfully sought to include in the unit description areas in which the employer had not conducted business and had no immediate plans to do so see, *Oklahoma Installation Co*., 305 NLRB 812, 813 (1991).

[6]/ The Petitioner sets forth in its brief a number of potential problems with representing employees outside its jurisdiction. These issues have apparently been dealt with in the past by the Kentucky Laborer's District Council acting on behalf of both Locals 189 and 576 – an option which would seemingly have been available in the instant case.

which the employer had been a member and the union constituted an appropriate unit based upon the history of collective bargaining that it reflected. In the instant case, the history of collective bargaining between the parties encompassed a unit limited to 24 counties -- this despite the fact that the Union's jurisdictional boundaries have, during the terms of multiple Section 8(f) contracts, encompassed more counties. I note, however, that the laborers recently employed by the Employer working in Fayette County, a county not in Local 576's jurisdiction and thus not sought to be included in the unit, apparently had the exact same terms and conditions of employment as other employees. Thus, it does not appear that a unit excluding such employees who might work outside the Petitioner's jurisdiction in the future would be appropriate in any event. [7]/

The Petitioner argues that there is some practice in the construction industry in its area for employers and unions to enter into contracts coextensive with the geographic jurisdiction of the contracting union. The evidence of the Petitioner's own past practice, however, belies this argument. Thus, in its contracts with the Employer the agreements involving solely Local 576 have never covered more than 24 counties. Moreover, the Petitioner's Building Construction Agreements with other employers did not, until recently, cover the additional 10 counties sought to be included in the unit. In any event where other relevant factors predominate, the area practice does not render an otherwise inappropriate unit which conforms to an area practice an appropriate one, or defeat a finding of appropriateness for a unit that does not appear to conform to the prevailing area practice. [8]/ See, *The Washington Palm, Inc*., 314 NLRB 1122, 1128-29 (1994) and cases cited therein.

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[7]/ Although the Petitioner argues that there is no great history of the Employer working in Fayette County, there is certainly more than found in 31 of the counties that it seeks to include in the unit.

It would appear that there would be no reason to exclude any group of laborers working for the Employer outside the Petitioner's jurisdiction in the future, so long as they had as strong a community of interest as the Fayette County employees did with the Employer's other laborers. *Cf., Alley Drywall, Inc*., 333 NLRB 1005 (2001) (petitioned-for unit under Sec. 9(a) of Act appropriate upon application of community-of-interest factors, even though petitioned-for unit was broader in scope than the historical bargaining unit in the parties' Sec. 8(f) collective-bargaining agreement; while Sec. 8(f) bargaining history is a factor to be weighed in determining the appropriate unit, it is not conclusive; language in "Deklewa," 282 NLRB 1375, 1377, not meant to limit scope of a single employer unit under Sec. 9(b) to the unit defined by the previous Sec. 8(f) agreement; further, Board in "*P.J. Dick*," 290 NLRB 150, did not find that "Deklewa" compelled a finding that only the historical 8(f) unit was appropriate, but rather made clear that a broader unit might also be appropriate).

[8]/ Moreover, while the Board utilizes industry practice in making unit determinations with respect to certain types of employers – including, for example, those operating in the restaurant and motel industry – this does not appear to apply to the construction industry.

Because I have determined that the unit sought by the Petitioner is inappropriate, and because it declines to proceed to an election in any alternate unit, I will dismiss the petition in this matter.

V. CONCLUSIONS AND FINDINGS

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. No question concerning representation exists because the unit in which an election is sought is inappropriate.

VI. ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and hereby is, dismissed.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C.

20570. This request must be received by the Board in Washington by 5 p.m., EST on **February 28, 2006**. The request may not be filed by facsimile.

Dated at Cincinnati, Ohio this 14th day of February 2006.

/s/ Gary W. Muffley, Regional Director

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